Supreme Court, U.S.
FILED
04-483 SEP 28 2004
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

NOREEN JUDITH HUNTER, PETITIONER

v.

NONA PORTER, ADMINISTRATRIX OF THE ESTATE OF JOSEPH S. HUNTER

PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

Noreen Judith Hunter
137 Nahant Street
Lynn, Massachusetts 01902
(781) 842-3468

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. Is it consistent with due process for the State court to dismiss with prejudice and without a trial as time-barred the plaintiff's civil action for declaratory relief filed prior to her putative father's estate being settled, seeking adjudication that she is an out of wedlock child with a right to inherit from her putative father's estate?

2. Does it square with fundamental fairness to deny the plaintiff the right to a trial on the merits of her claim by denying her equitable tolling of the one year limitation in M.G.L. c. 197 s. 9 since the Legislature's standard in passing the M.G.L. c. 190 s. 7 was too strict and when the plaintiff was already asserting her right to inherit in earlier litigation which case did not become final for over a year after her putative father's death?

3. Does the treatment of this plaintiff deny her rights under the Massachusetts Constitution and the Fourteenth Amendment, by providing unequal treatment of illegitimate children and favoring legitimate children.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 3

REASONS FOR GRANTING THE PETITION 11

CONCLUSION 22

APPENDIX

APPEALS COURT DECISION 1a

APPEALS COURT DECISION 12a

NORFOLK PROBATE & FAMILY COURT JUDGMENT 47a

SJC FAR DENIAL 48a

TABLE OF AUTHORITIES

BLIXT V. BLIXT, 437 MASS. 649 (2002), CERT. DEN., 537 U.S. 1189 (2003) 22
CHRISTO V. EDWARD G. BOYLE INS. AGENCY, 402 MASS. 815 (1988) 17
COMMONWEALTH V. CHASE, 385 MASS. 461 (1982) 15
COMMONWEALTH V. GRUTTNER, 385 MASS. 474 (1982) 14
FLYNN V. CONNORS, 39 MASS. APP. CT. 365 (1995) 16, 17
G.L.C. 209C, DEPARTMENT OF REVENUE V. ROE, 29 MASS. APP. CT. AT 968 ..... 16, 17
GOMEZ V. PEREZ, 409 U.S. 535 19
GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH, 440 MASS. 309, 330-334 (2003) 22
HOUGHTON V DICKINSON, 196 MASS. 389 (1907) 13
LOWELL V. KOWALSKI, 380 MASS. 663, 670 (1980) 11, 12, 22
LYONS V. LABOR RELATIONS COMMISSION, 19 MASS. APP. CT. 562 (1985) 15
MACKEEN V. KASINSKAS, 333 MASS. 695 (1956) 17
MARCH 28, 1997, 424 MASS. 1107 6
MATHEWS V. LUCAS, 427 U.S. 495, 506 .....18, 21, 22
MCLEARN V. HILL, 476 MASS. 519 (1931) 17
MILLS V. HABLUETZEL, 456 U.S. 91 (1982) 15, 18, 21
NOREEN JUDITH HUNTER VS. NONA PORTER ADMINISTRATRIX OF THE ESTATE OF JOSEPH S. HUNTER, 57 MASS. APP. CT. 233 (2003) 1
PAQUETTE V. KOSCOTAS, 12 MASS. APP. CT. 52 (JUNE 10, 1981) 13
POWERS V. WILKINSON, 399 MASS. 650 (1987) 16
REED V. CAMPBELL 477 U.S. 852 (1986) 19
SHAFNACKER V. RAYMOND JAMES & ASSOC., 425 MASS. 724 (1997) 17
SULLIVAN V. FARRELL, 383 MASS. 119 (DECEMBER 3, 1980) 13
TELESETSKY V. WIGHT, 395 MASS. 868 16
TRIMBLE V. GORDON, 430 U.S. 762 (1977) 17, 21

WEBER v. AETNA CASUALTY & SURETY CO., 406 U.S. 164, 172 ..... 18, 20, 21
WILLIAMS v. ELY, 423 MASS. 467 (1996) 15

OPINIONS BELOW

The published decision and judgment of the Massachusetts Appeals Court in *Noreen Judith Hunter vs. Nona Porter Administratrix of the Estate of Joseph S. Hunter, 57 Mass. App. Ct. 233 (2003),* affirming the motion judge of the Probate and Family Court Department, is set forth in the Appendix hereto (App. 1-11).

The published decision and judgment of the Massachusetts Appeals Court in *Kathleen C. Keville, temporary guardian v. Marian Bourne McKeever et al.,* 42 Mass. App. Ct. (1997) affirming the trial judge of the Probate and Family Court, is set forth in the Appendix hereto (App.11-46).

The order of the Supreme Judicial Court of Massachusetts in *Noreen Judith Hunter v. Nona Porter, Administratrix of the Estate of Joseph S. Hunter, Mass. (6/30/04), denying the Plaintiff-appellant's Application For Further Appellate Review, is set forth in the Appendix hereto (App.47).*

The unpublished Order of the Norfolk Division of the Probate and Family Court Department of Massachusetts (Smoot, J.) in *Noreen Judith McKeever Hunter v. Nona Hunter Porter,* Norfolk Probate Docket No. 97E0118(2/20/99), is set forth in the Appendix hereto (App.48).

JURISDICTION

The order of the Supreme Judicial Court of Massachusetts, the state court of last resort having jurisdiction to review the decisions of all inferior state courts, refusing to allow further appellate review of the

Appeals Court's affirmance of the Probate and Family Court's decision, was entered on June 30, 2004. (App.47).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Massachusetts General Law Chapter 190 Section 7

> ... A person may establish paternity, if within the period provided under Section 9 of Chapter One Hundred Ninety Seven for bringing actions against executors and administrators, such person either (a) delivers to the executor or administrator an authenticated copy of a judgment rendered by a court of competent jurisdiction during the decedent's lifetime adjudging the decedent to be the father of the person born out of wedlock, or (b) commences, in a court of competent jurisdiction, an action in which the executor or administrator is a named party and in which such paternity is ultimately proved.

Massachusetts General Law Chapter 197 Section 9

> ... an administrator shall not be held to answer to an action by a creditor of the deceased unless such action is commenced within one year after the date of death of the deceased . . .

Massachusetts General Law Chapter 197 Section 13

> ... A creditor of the deceased, whose right of action shall not accrue within one year after the dare of death of the deceased, may present his claim to the probate court at any time before the estate is fully administered; and if,upon examination thereof, the court shall find that such claim is or may become justly due from the estate, it shall order the . . .
> administrator to retain in his hands, sufficient assets to satisfy the same. . . .

STATEMENT

On December 11, 1997, Joseph S. Hunter's ("Joseph") daughter Noreen Hunter ("Noreen") filed a Complaint for Declaratory Judgment along with the Plaintiff's birth certificate in the Norfolk Probate Court, which was served upon her half-sister, Nona Porter ("Nona"), the Administratrix of the Estate of Joseph S. Hunter on December 12, 1997, claiming her rights as an illegitimate child to inherit from her father, Joseph, who died intestate on April 27, 1996.

Noreen brought a Motion for a Speedy Trial on July 3, 1998. A Pretrial Conference was held on October 5, 1998. Both parties filed Pretrial Memoranda. On November 23, 1998, the Porter filed a Notice of Objection and a Motion to Dismiss for Failure to Comply with M.G.L. c. 197 s. 9 and M.G.L. c. 190 s. 7. On January 7, 1999, Noreen filed an Opposition to

Porter's Motion to Dismiss for Failure to Comply with M.G.L. c. 197 s. 9 and M.G.L. c. 190 s. 7 with Exhibits. The Judgment on Motion to Dismiss was ordered on January 19, 1999 and docketed on February 26, 1999. On March 17, 1999, Noreen Hunter filed her Notice of Appeal.

Joseph was born in 1905 and emigrated from Lithuania to the United States in 1924. In 1928, he married Edythe Hunter and subsequently had two children, a daughter, the Respondent, Nona Porter, and a son, Ronald Hunter ("Ron"), born in 1943.Over the next sixty years, Joseph amassed substantial assets including certain real property on Marlborough Street and Harvard Avenue in Boston.

From the early 1950's through 1987, Marian McKeever ("Marian") worked for Joseph as his bookkeeper and secretary. In 1953, Marian moved into Joseph's Marlborough Street property and began collecting rents there, keeping them for herself . Marian claimed that beginning in the early 1950's, she and Joseph had a personal relationship and that their relationship produced a daughter, the Petitioner, Noreen Judith Hunter, born on December 9, 1955.

There was no formal adjudication of Joseph's paternity of Noreen at that time. However, Marian often used the name Marian Hunter and in September of 1980, shortly after Hunter formally acknowledged Noreen as his daughter in an affidavit, Noreen changed her name to Noreen Judith Hunter.

Sometime in 1982, after his wife had passed away, Joseph moved into the Marlborough Street property with Marian and from that time forward, Marian was Joseph's companion and personal attendant. His behavior at this time was somewhat erratic and it was eventually found that from August,

1982, Joseph was incapable of handling his own affairs. In December of 1982, he executed a deed conveying a joint interest in the Marlborough Street property to Marian.

In December of 1990, Nona filed a petition for conservatorship in the Probate and Family Court Department alleging that Joseph had become incapacitated by reason of mental weakness.

On May 24, 1991, Noreen filed a petition for permanent guardianship and eventually Attorney Kathleen Keville ("Keville") was appointed temporary guardian of Joseph's person and estate. Shortly thereafter, Keville filed a complaint seeking to set aside Joseph's two conveyances of his real estate to Marian and Noreen in 1982 and 1990, respectively.

A dispute arose over Joseph's assets between Marian and Noreen (Joseph's out of wedlock daughter) on the one side and Nona Porter, Joseph's other daughter, on the opposing side. A lengthy trial ensued and an amended judgment entered on January 24, 1994.

During the course of the proceedings, Marian claimed that Noreen was Joseph's daughter. However, the trial judge expressly found that there was no "credible evidence' that Noreen was, in fact, Joseph's daughter and accordingly he made no adjudication of Joseph's paternity of Noreen. Besides other post-judgment motions seeking to undo this judgment, Marian again sought to have a paternity test conducted to determine that Joseph was Noreen's father. The trial judge, however, refused to do so "without prejudice to the filing of an appropriate action."

Marian and Noreen appealed this judgment to the Appeals court. On April 27, 1997, while this appeal by Marian and Noreen from the judgment was still

awaiting a resolution by the Appeals Court, Joseph died intestate.

On January 31, 1997, in *Keville v. McKeever*, (A1-12), the Appeals Court affirmed the judgment. In so ruling, the opinion of Judge Armstrong adverted to the fact that Marian had alleged below that Joseph was Noreen's father, that the trial judge rejected that claim because he found no "credible evidence" to support this claim and that accordingly "there was (and has been) no adjudication of paternity. . .". The Supreme Judicial Court denied further appellate review on March 28, 1997, 424 Mass. 1107.

On May 16, 1997, Nona was appointed the administratrix of Joseph's estate and on December 11, 1997, before Joseph's estate was settled, Noreen filed a complaint against Nona as administratrix seeking a declaratory judgment that she (Noreen) is the out of wedlock daughter of Joseph and is therefore entitled to a one-third share of his estate. She also sought a speedy trial and a notice of lis pendens to prevent Nona from selling any of the estate's assets without accounting to Noreen for her one-third share.

Nona subsequently moved to dismiss Noreen's complaint as time-barred under the provisions of G.L.c. 190, Section 7, and G.L.c. 197, Section 9(a), because Noreen's action was not begun within one year of Joseph's death. G.L. c. 190, Section 7, provides *inter alia* that

> If a decedent has acknowledged paternity of a person born out of wedlock or if during his lifetime or after his death a decedent has been adjudged to be the father of a person born out of wedlock that person is heir to his father and of any person from whom his father might have

> inherited, if living, and the decedents of a person born out of wedlock shall represent that person and take by descent any estate which such person would have taken, if living. *A person may establish paternity if, within the period provided under section nine of chapter one hundred and ninety-seven for bringing actions against executors and administrators,* such *person either* (a) delivers to the executor or administrator an authenticated copy of a judgment rendered by a court of competent jurisdiction during the decedent's lifetime adjudging the decedent to be the father of a person born out of wedlock, or (b) *commences, in a court to competent jurisdiction, an action in which the executor or administrator is a named party and in which such paternity is ultimately proved.*

(emphasis supplied). Further, Section 9(a) of G.L. c. 197 provides that "an executor or administrator shall not be held to answer to an action by a creditor of the deceased unless such action is commenced within one year after the date of death of the decease . . ."

Noreen opposed the motion by adducing proof that Joseph had on serial occasions during his life expressly acknowledged his paternity of Noreen by notarized affidavit, by statements to his attorneys and in other litigation with Nona and Ron. Moreover, Noreen adduced further evidence that Nona (and Ron) had expressly acknowledged during discovery in a

related suit they had brought against Joseph that Noreen was the out of wedlock daughter of Joseph.

Noreen further contended that the earlier consolidated action of *Keville v. Mckeever*, (A.12-46) contained a claim on her part that she was Joseph's out of wedlock daughter and that a paternity test upon Joseph (who was then hospitalized) was mandated in order to prove her claim, a paternity test which Nona opposed. Besides finding no "credible evidence" to support his claim, the Probate judge denied Noreen's serial motions to compel a paternity test of Joseph "without prejudice to renewal after the filing of an appropriate action."

Noreen therefore argued that this *Keville v. McKeever* suit, begun in 1991 and not actually concluded until June of 1997, more than one year after Joseph's death, became by the circumstances of Joseph's intervening death, her repeated requests in that suit for paternity testing and the Probate Judge's advice to renew such request after the filing of "an appropriate action," an integral first part of the "action" which should have been "commence[d] in a court of competent jurisdiction...in which the executor or administrator is a named party and in which such paternity is ultimately proved, "as required by G.L.c. 190, Section 7(b).

The second part of the "action," Noreen claimed, was this declaratory action she brought against Nona on December 11, 1997, a reasonable time after the Supreme Judicial Court had denied further appellate review in *Keville V. McKeever* on March 28, 1997, and considering the ninety days for bringing a petition for certiorari to the United States Supreme Court (June 24, 1997), just 167 days after the matter of *Keville v. McKeever* was finally concluded. As Noreen argued,

her present suit to establish Joseph's paternity and to qualify as his daughter for the purpose of his estate distribution

> is a continuation of the *[Keville v. Mckeever]* litigation . . .; that at the moment of Joseph['s] death the litigation had not been finally adjudicated (the Supreme Judicial Court decision was rendered on March 28, 1997); that without the Supreme Judicial Court decision the within complaint could not have been brought and [she] should have had a reasonable time thereafter in which to file the within complaint (a 90-day waiting period should also be calculated to determine if the state court action would be appealed to the United States Supreme Court); that Judge Smoot contemplated maintaining jurisdiction of this ongoing and continuing request to determine the paternity; that since the *[Keville v. McKeever]* litigation was ongoing at the moment of Joseph['] death, [Section] (b) of c. 190, Section 7 was immediately satisfied and since there has been no final determination as yet of the paternity issue, the outcome is yet to be determined as to whether or not paternity is ultimately proved.

The Probate and Family Court Department, Smoot, J., allowed Nona's motion to dismiss Noreen's complaint and upon Noreen's appeal of that ruling, the Appeals Court affirmed the decision on January 29, 2003, in a published opinion. *Hunter v. Proter*, (A.1-11). Writing for the Court, Judge Duffly concluded that where paternity was contested, and action such as Noreen's must be commenced within one year form the date of the death of the deceased; and "[b]ecause

Noreen's complaint was filed nearly twenty months after the date of Joseph's death, it was properly dismissed." (A.6).

In reaching this result, the intermediate appellate court treated Nona's motion to dismiss as one for summary judgment under Mass. R. Civ. P. 56 since it appeared that the Probate Judge considered the sixteen exhibits attached to Noreen's opposition. (A.8). In addition, the Court took notice of Noreen's proof that Joseph had already expressly acknowledged Noreen as his daughter by affidavit in 1980, and through communications with his attorneys thereafter. (A.9). Moreover, the opinion made note of the fact that Noreen had unsuccessfully attempted at various times in the earlier *Keville v. McKeever* litigation to prove Joseph's paternity by tests and that her post-judgment motion there for such relief was denied by the Probate Judge "without prejudice to renewal after the filing of an appropriate action." (A.9). Finally, none of Noreen's evidence showing that Nona her self had admitted in related litigation with Joseph that Noreen was in fact his acknowledged daughter was referenced by the Appeals Court's decision.

While the Court agreed with Noreen that the second sentence of G.L.c. 290, Section 7, providing that an acknowledgment of paternity by the putative father during lifetime that a person was his offspring would obviate the need for commencing a separate action to establish that fact, it disagreed with Noreen's claim that because Nona was on notice of Joseph's serial acknowledgments of paternity in *Keville v McKeever*, this sentence's requirements were met and that she (Noreen) was therefore entitled, without more, to share in Joseph's estate. (A.11). Instead, the Court ruled that where the issue of paternity is contested, "the

additional requirement set forth in c. 190, Section 7, applicable to the circumstance, namely, commencement of an action to establish paternity, must be satisfied." (A.4).

Citing *Lowell v. Kowalski*, 380 Mass. 663, 670 (1980), the Appeals Court further observed that Joseph's notarized statement attesting to his paternity of Noreen, relied upon by Noreen in her opposition to Nona's motion to dismiss, "would, upon admission in evidence and established to be the voluntary, knowing statement of the decedent, support an adjudication of paternity." (A.10). However, because the issue of paternity was contested, Noreen was bound under G.L.c. 190, Section 7, either to deliver an adjudication of paternity or to commence an action in a court of competent jurisdiction against Nona within one year of Joseph's death. (A.10). Finally, the Appeals Court ruled in a footnote that it rejected

> Noreen's claim, made without citation of authority, that the requirement of commencing an action within one year was fulfilled upon the filing of her petition for permanent guardianship on May 24, 1991.

(A.11).

Noreen then filed an Application for Leave to Obtain Further Appellate Review of this decision with the Supreme Judicial Court of Massachusetts.

Following the Supreme Judicial Court's denial of Noreen's application on June 30, 2004 (App.47), Noreen now brings her petition in this Court seeking a writ of certiorari to the Appeals Court of Massachusetts.

REASONS FOR GRANTING THE WRIT

Substantial Reasons Affecting the Public Interest and An Emerging Consensus Among the Lower Courts That Imposing The Short One Year Limitation In The Treatment Of Illegitimate Children Is A Violation of Due Process Warrants the Granting of This Petition.

In *Lowell v. Kowalski*, 380 Mass. 663 (May 14, 1980), the Supreme Judicial Court ruled that an illegitimate daughter was entitled to inherit from her intestate father where the father had openly acknowledged paternity orally and in writing but had never formally acknowledged the child nor been adjudicated the father. The Lowell Court held, "We accept a judicial adjudication of paternity as one appropriate method of establishing inheritance rights. If, however, judicial adjudication were the only permitted method of establishing those rights, the classifications would be unconstitutionally restrictive because it would unnecessarily foreclose the rights of illegitimates who could convincingly establish their parentage. An option limited to an adjudication of paternity would deny, for example, rights to a child whose natural father publicly and consistently acknowledge his child and did so in writing, perhaps even under oath." In the case at bar, the Plaintiff surely complied with the holdings of the Lowell Court.

On July 7, 1980, the legislature approved amendments to G.L. c. 190 s. 6 and 7 by adding a provision that acknowledgment or adjudication without intermarriage is sufficient to make the illegitimate child

an heir of the father. The amendment also provided that a person may establish paternity, if within the period for creditors' actions prescribed by G.L. c. 197 s. 9, the person either:

- delivers to the administrator an authenticated copy of a judgment adjudicating the decedent during his lifetime to be the father of an illegitimate person; or

- commences an action in which the administrator is a named party and in which such paternity is ultimately proved.

In *Sullivan v. Farrell*, 383 Mass. 119 (December 3, 1980), the Court, following Lowell and further determined that, "Farrell's illegitimate child was his next of kin for the purpose of recovery under G.L. c. 229 Section 2..."

In *Paquette v. Koscotas*, 12 Mass. App. Ct. 52 (June 10, 1981), the illegitimate child of a decedent who had acknowledge the child as his during his lifetime, although not in writing, was entitled to status of next of kin and qualified for appointment of her father's estate.

In *Higgins v.Ripley*, 16 Mass. App. Ct. 928 (1983) it was held that in order for an illegitimate child to inherit from its father by reason of acknowledgment of paternity pursuant to G.L. c. 190, section 7, neither a writing acknowledging paternity nor a stipulation of paternity is necessary. This case was based upon an interpretation of *Houghton v Dickinson*, 196 Mass. 389 (1907) which declared that, "...the subsequent recognition of the child as his offspring by the father, which recognition may be shown by conduct, as well as by declarations. The Houghton Court held the following concerning conduct: "...such recognition [(sic)

of parentage] may be shown by conduct as well as by declarations..

...During their engagement, and under a promise of marriage intercourse took place between the decedent and the respondent's mother. If upon knowledge of her pregnancy, at first he refused to perform his contract, neither then, nor at birth, did he deny the paternity of the child, but declared him to be his own, and consented that he should be named after him."

As in the cases cited above, and argued before the Probate Court on January 7, 1999, Noreen's deceased father during his lifetime had acknowledged that he was her father, not only orally and in writing, but also by his conduct. The cases cited above, both before and after the 1980 amendment to M.G.L. c. 190 s. 7, support the facts in the case at hand.

It should be noted that the Court in *Commonwealth v. Gruttner*, 385 Mass. 474 (1982), declared, "We conclude that no time bar blocks the bringing of an action to adjudicate the paternity of an illegitimate child." The Court held that under M.G.L. c. 273 s. 15 and M.G.L. c. 209C no statute of limitations applies to an action for the adjudication of paternity. The Court further stated, "On the rare occasions when the question of a limit in time to the adjudication of paternity has been before this Court, we have consistently held that there is no statute of limitations that applies...The fact remains that the passage of time bears no logical relation to the question whether a man is actually the father of a child." Equity dictates that no statute of limitation should be enforced in the case at hand.

There should be equitable tolling of the one year limitation in M.G.L. c. 197 s. 9 because the Legislature's

standard in passing the M.G.L. c. 190 s. 7 was too strict and denies the Plaintiff her rights under the Massachusetts Constitution and the Fourteenth Amendment of the US Constitution, by providing unequal treatment of illegitimate children and favoring legitimate children.

Because the Plaintiff and the Defendant were in litigation from 1993 until as late as June 28, 1997, a constructive tolling agreement of the "one year statute" should have been effected since the running of the statute would begin when the Plaintiff "learned or reasonably should have known, of the harm caused by the Defendant's conduct." See *Williams v. Ely*, 423 Mass. 467 (1996).

In *Mills v. Habluetzel*, 456 U.S. 91 (1982), where a one year statute of limitations for establishing paternity of an illegitimate child was challenged (and found vulnerable), equal protection analysis focused on two related requirements. First, the period for obtaining support...to illegitimate children must be sufficiently long in duration to present a reasonable opportunity...to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims." See *Lyons v. Labor Relations Commission*, 19 Mass. App. Ct. 562 (1985).

It is now undisputed that "a father's obligation to support an illegitimate child commences at the time he knows or should know that he is the father of the child, or such time he is adjudicated the father under G.L.c. 273, section 15..." *Commonwealth v. Chase*, 385 Mass. 461 (1982).

In *Flynn v. Connors*, 39 Mass. App. Ct. 365 (1995), the Court wrote in footnote #10, "The statute of limitations issue appears to be a particularly problematic one. Although we have noted that 'the six-year statute of limitations, applicable under G.L. c. 273, [is not] applicable to civil actions under G.L.c. 209C, *Department of Revenue v. Roe*, 29 Mass. App. Ct. at 968, the limitations period that is applicable to such actions (none appearing in c. 209C itself) has never been directly adjudicated.

On September 18, 1985 the Supreme Court in *Telesetsky v. Wight*, 395 Mass. 868 decided to grant a constructive allowance of an extension of time under G.L. c. 197 s. 9 because of the "administrator's failure to act on a claim within sixty days after the expiration of the four month period for presenting the claim and did not warn the claimant that the claim would be barred unless she brought action on it within sixty days. Furthermore receipt of the claim by the administrator tolls the nonclaim statute and shifts the burden to him. G.L.c. 197 section 9, first par. (a), second par. Under the provisions of section 9, third par., the administrator may notify the creditor that the claim has been allowed or disallowed. If the admini- strator fails to give notice of disallowance to the claimant within sixty days, following the expiration of the 4-month period running from the date of the approval of his bond, it 'shall have the effect of a notice of allowance.'"

In Massachusetts the constitutionality of issues surrounding illegitimate children have been sparsely addressed. The Court held in *Powers v. Wilkinson*, 399 Mass. 650 (1987), that "state action is not involved, nor is the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States implicated, by the application of a common law rule of

construction to interpret the word 'issue' to mean 'only persons of the class were born in lawful wedlock'; therefore no constitutional rights of a persons thereby excluded from a class of beneficiaries of a trust would be violated by this Court's so doing." The case at bar does involve state action through its vehicles G. L. c.197 § 9 and G. L. c. 190 § 7.

In *Flynn v. Connors* n, 39 Mass. App. Ct. 365 (1995), the Court wrote in footnote #10, "The statute of limitations issue appears to be a particularly problematic one. Although we have noted that 'the six-year statute of limitations, applicable under G.L. c. 273, [is not] applicable to civil actions under G.L.c. 209C, *Department of Revenue v. Roe*, 29 Mass. App. Ct. at 968, the limitations period that is applicable to such actions (none appearing in c. 209C itself) has never been directly adjudicated.

Equitable tolling is a potential remedy for the injustice suffered by the Plaintiff. Equitable tolling of the Statute of Limitations has been allowed in Massachusetts in the following cases: *McLearn v. Hill*, 476 Mass. 519 (1931); MacKeen v. *Kasinskas*, 333 Mass. 695 (1956); *Christo v. Edward G. Boyle Ins. Agency*, 402 Mass. 815 (1988); and *Shafnacker v. Raymond James & Assoc.*, 425 Mass. 724 (1997).

The Supreme Court of the United States has spoken out quite clearly on discrimination involving the classes of illegitimate children. The first instance in recent history to address these issues was in the case of *Trimble v. Gordon*, 430 U.S. 762 (1977). The *Trimble* Court ruling on Section 12 of the Illinois Probate Act, which allowed illegitimate children to inherit by intestate succession only from their mothers (though under Illinois law, legitimate children could inherit by intestate succession from both their mothers and

fathers) held that Section 12 of the Illinois Probate Act violated the Equal Protection Clause of the Fourteenth Amendment. The *Trimble* Court further held the following : A classification based on illegitimacy such as that challenged here is not "suspect" so as to require that it survive "strict scrutiny," Mathews v. Lucas, 427 U.S. 495, 506. Nevertheless, this Court requires, "at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose," *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172, and the Court's previous decisions in this area show that the standard is "not a toothless one." *Mathews v. Lucas*, supra at 510. P. 767.

Section 12 cannot be justified on the ground that it promotes legitimate family relationships. A State may not attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships. Pp. 768-770.

Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate. Section 12 is not "carefully tuned to alternative considerations," *Mathews v. Lucas*, supra at 513, as is illustrated by the fact that, in the instant case, the decedent had been determined to be the appellant child's father in a state court paternity action. Pp. 770-773.

The fact that appellant's father could have provided for her by making a will does not save § 12 from invalidity under the Equal Protection Clause. Pp. 773-774.

The United State Supreme Court spoke out again in the case of *Mills v. Habluetzel*, 456 U.S. 91 (1982) regarding a Texas Statute which provided that a paternity suit to identify the natural father of an

illegitimate child for purposes of obtaining support must be brought before the child is one year old, or the suit was barred. The Texas Court of Civil Appeal, affirming the Lower Court, held that the one year limitation was not told during minority (the child was one year and seven months old) and did not violate the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court reversed the decision of the Texas Court of Appeals and held the following:

The one year period for establishing paternity denies illegitimate children in Texas the Equal Protection of law.

A State that grants an opportunity for legitimate children to obtain paternal support must also grant that opportunity to illegitimate children, *Gomez v. Perez*, 409 U.S. 535, and this latter opportunity must be more than illusory, although it need not be coterminous with the procedures accorded legitimate children.

The period for obtaining support granted by Texas to illegitimate children must be of sufficient duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. And the time limitation on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims. Section 13.01 fails to meet either of these requirements and thus denies equal protection.

In 1986, the United States Supreme Court spoke out again in the case of *Reed v. Campbell* 477 U.S. 852 (1986). The Court declared that the interest, protected by the Fourteenth Amendment, in avoiding unjustified discrimination against children born out of wedlock, requires that appellant's claim to a share in her father's estate be protected by the full applicability of *Trimble*.

There is no justification for the State's rejection of the claim. At the time appellant filed her claim, *Trimble* had been decided, and her father's estate remained open. Neither the date of the father's death nor the date appellant's claim was filed should have prevented the applicability of Trimble. Those dates, either separately or in combination, had no impact on the State's interest in orderly administration of the estate. Pp. 854-857.

Further, the *Reed* Court took notice of the fact that the estate was still open when the appellant formally notified the administratrix and the Probate Court of her claim to a one-sixth share of the estate, prior to filing a former complaint.

In the case at hand, the Plaintiff had formally notified the administratrix and the Probate Court of her claim during the proceedings in the Suffolk Probate case. Moreover, the estate was still open when the Plaintiff filed her complaint on December 11, 1997. The constitutionality of the Massachusetts statutory provisions appeared to impose special burdens on illegitimate children. Plaintiff contends that a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parents' misconduct. The effects of G. L. c.197 § 9 and G. L. c. 190 § 7 impose special burdens on illegitimate children.

"It is true, of course, that the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears not relation to the individual's ability to participate in and *contribute to society. The Court recognized in* Weber v. Aetna Casualty & Surety Co., 406 U.S.164 (1972) that visiting condemnation upon the child in

order to express society's disapproval of the parents' liaison is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bar some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual as well as an unjust way of deterring the parent.' 406 U.S. at 175." *Mathews v. Lucas*, 427 U.S. 495, 505 (1976).

The Plaintiff contends that the application of the statutes violate the rights of the nonmarital child to equal protection of the laws as guaranteed through the laws of the Commonwealth by the Fourteenth Amendment to the United States Constitution. In relevant part the Fourteenth Amendment declares "no state shall...deny to any person within its jurisdiction the equal protection of the laws."

This Court should provide the equal treatment protected by the Fourteenth Amendment to the Constitution and avoid unjustified discrimination against children born out of wedlock by allowing the Plaintiff herein the remedy of equitable tolling of the one year limitation in G. L. c.197 § 9 because the legislature's standard in passing G. L. c. 190 § 7 and Plaintiff has been denied her rights under Massachusetts law and the Fourteenth Amendment of the United States Constitution.

It is beyond dispute that an out of wedlock child has a constitutionally protected right to inherit from her father and to truncate that right with an inrealistically short limitations period for realizing that right is a denial of the equal protection of the laws. *Mills v. Habluetzel*, 456 U.S. 91, 97-101(1982). See *Trimble v.* Gordon, 430 U.S. at 769-771; *Lowell v.*

Kowalski, 380 Mass. 663, 669-670 (1980); *Mathews v. Lucas*, 427 U.S. 495, 505-506 (1976).

This Court has also recognized that the expanding realities of the American family invoke new protections to insure that those persons whose rights are now emerging in this expanded reality are denied neither due process nor the qual protection of the laws. *Goodridge v. Department of Public Health*, 440 Mass. 309, 330-334 (2003). *Blixt v. Blixt*, 437 Mass. 649 (2002), cert. Den., 537 U.S. 1189 (2003). Noreen thus submits that as long as her putative father's estate was still not settled, she has a right to bring this action to establish paternity and share in the estate irrespective of the running of the limitations period of Section 9(a).

CONCLUSION

For all the reason identified herein, this Court should grant Noreen's petition for certiorari to the Appeals Court of Massachusetts, enter an order vacating the judgment below and remanding the matter to the Norfolk Division of the Probate and Family Court Department for a trial of Noreen's claims; and/or provide her with such relief as is fair and just in the circumstances.

Respectfully submitted,
NOREEN JUDITH HUNTER
(pro se)
Noreen Judith Hunter
137 Nahant Street
Lynn, Massachusetts 01902
(781) 842-3468

(any footnotes trail end of each document)
LEXSEE 57 MASS APP CT 233

NOREEN JUDITH HUNTER
vs. NONA PORTER. n1

No. 00-P-348

APPEALS COURT OF
MASSACHUSETTS

57 Mass. App. Ct. 233; 782 N.E.2d 530; 2003 Mass. App. LEXIS 112

March 15, 2002, Argued
January 29, 2003, Decided

SUBSEQUENT HISTORY: [***1] As Corrected March 14, 2003. Review denied by *Hunter v. Porter, 442 Mass. 1104, 810 N.E.2d 1230, 2004 Mass. LEXIS 475 (2004)*

PRIOR HISTORY: Civil action commenced in the Norfolk Division of the Probate and Family Court Department on December 11, 1997. A motion to dismiss was heard by John M. Smoot, J. *Keville v. McKeever, 42 Mass. App. Ct. 140, 675 N.E.2d 417, 1997 Mass. App. LEXIS 26 (1997)*

DISPOSITION: Judgment affirmed.

LexisNexis(R) Headnotes

COUNSEL: Roberta Golden for the plaintiff.

John T. Daley for the defendant.

JUDGES: Present: Duffly, Kass, & Trainor, JJ.

OPINIONBY: DUFFLY

OPINION:

[**531] [*233] DUFFLY, J. In a proceeding for declaratory judgment, Noreen Judith Hunter (Noreen) sought an adjudication that she was born out of wedlock to Joseph S. Hunter (Joseph) and Marian McKeever (Marian), thereby to establish her right to inherit from Joseph's estate. The plaintiff's complaint, filed nearly twenty months following Joseph's death, was dismissed as not having been timely filed as required by *G.L. c. 190, § 7*, n2 and [*234] *G.L. c. 197, § 9*(a). n3 The former statute establishes procedures for a child born out of wedlock seeking to share in the assets of the estate of a father dying intestate; the latter statute imposes a one-year limitation period for bringing an action against an executor or administrator.

The plaintiff's appeal raises the question whether the one-year limitation [**532] period for bringing an action to establish paternity that is imposed through operation of *G.L. c. 190, § 7*, is inapplicable when the decedent has, by word or deed during his lifetime, acknowledged paternity of a person seeking to inherit from his estate. n4 We affirm the dismissal.

[*235]

[***4] In 1924, Joseph immigrated to the United States where, over the next sixty years, he amassed substantial assets. *Id., 42 Mass.App.Ct at 141-142.* Marian, Joseph's long-time bookkeeper, secretary, and, later, personal attendant, gave birth to Noreen on December 9, 1955. n6 At the time of Noreen's birth, Marian had been employed [*236] for five years as Joseph's bookkeeper. Joseph was then married, and had been since 1928; he and his wife had two children, a son and Nona Porter. Joseph's [**533] wife died in 1982. Sometime in 1982, Joseph moved into one of his properties with Marian. Joseph died intestate on April 27, 1996; Nona Porter was appointed to administer Joseph's estate and, in that capacity, is the defendant in the matter now before us.

[***5] In our prior opinion, we chronicled Joseph's increasing dementia and the stripping of his assets by Marian, Noreen, and Marian's son, Frank. *Id., 42 Mass.App.Ct. at 144-148.* We found no reason to disturb the judgment that, beginning in at least August, 1982, Joseph was incompetent and "that the McKeevers [Noreen, Marian and Frank] have no interest in Joseph's estate." *Id., 42 Mass.App.Ct. at 147, 155.* n7 That conclusion, however, was not based upon the right of a child born out of wedlock to seek to inherit from her father's estate pursuant to *G.L. c. 190, § 7*, and is, therefore, not dispositive of the issues here on appeal.

As we have observed, Joseph died in April, 1996. Noreen's complaint was filed on December 11, 1997. In

that complaint, Noreen alleges that [***6] she is the out of wedlock child of Marian and Joseph, and she asks that "the Court adjudicate the Plaintiff to be the daughter of Joseph S. Hunter for the purposes of establishing entitlement to his estate." Noreen's materials in opposition to the defendant's motion to dismiss contain documents supporting her assertion that Joseph acknowledged paternity of Noreen during his lifetime. See note 5, supra. n8

Discussion. Under *G.L. c. 190, § 7* [***7] , the limitations period set out in *G.L. c. 197, § 9*, is made applicable to actions filed [*237] by a person born out of wedlock seeking to establish a right to inherit from her father. Thus, where paternity is contested, the action must be commenced within one year from the date of death of the deceased. See *Flannery v. Flannery, 429 Mass. 55, 59, 705 N.E.2d 1140 (1999)* ("*G.L. c. 197, § 9*(a), bars the plaintiff's claim one year from the date of the decedent's death"); *Eresian v. Mattei, 52 Mass.App.Ct. 16, 17, 750 N.E.2d 30 (2001)* ("There is a short statute of limitations, *G.L. c. 197, § 9*(a), which requires creditors to bring an action against the executor or administrator within one year after the date of death of the deceased"). Because Noreen's complaint was filed nearly twenty months after the date of Joseph's death, it was properly dismissed.

We agree with Noreen that the second sentence of c. 190, § 7, provides an option, in addition to adjudication, by which an illegitimate child may establish paternity following the death of a putative father. That sentence states [***8] as follows: "If a decedent has acknowledged paternity of a person born out of wedlock

or if during his lifetime or after his death a decedent has been adjudged to be the father of a person born out of wedlock that person is heir of his father." *G.L. c. 190, § 7.* We disagree, however, with Noreen's claim that because the administrator was on notice of the existence of evidence constituting Joseph's [**534] "acknowledgment" of paternity, n9 Noreen fulfilled the prerequisites to establishing paternity set forth in c. 190, § 7, and is entitled, without more, to share in Joseph's estate. Where the issue of paternity is contested, the additional requirement set forth in c. 190, § 7, applicable to the circumstances, namely, commencement of an action to establish paternity, must be satisfied. See, e.g., *Higgins v. Ripley, 16 Mass.App.Ct. 928, 928, 450 N.E.2d 186 (1983); Doe v. Roe, 19 Mass.App.Ct. 270, 272, 473 N.E.2d 719 (1985).*

[***9] When, in the context of claims to inherit, the issue of paternity is uncontested, no action need be commenced and paternity may be established by stipulation of the parties that during the decedent's lifetime he acknowledged that he was the father of the person claiming a right to inherit from his estate. [*238] See *Lowell v. Kowalski, 380 Mass. 663, 670, 405 N.E.2d 135 (1980)* (where "it was established, based on a stipulation of the parties, that, on numerous occasions, the defendant's intestate acknowledged the paternity of the plaintiff orally and in writing"). n10 See also *Paquette v. Koscotas, 12 Mass.App.Ct. 52, 53, 421 N.E.2d 483 (1981)* (parties' stipulation that decedent acknowledged paternity "obviates any further inquiry by us for other evidence of acknowledgment").

[***10] The court in Lowell identified three forms of evidence that could establish paternity in contested proceedings: "the father's written acknowledgment of his paternity (see for such an example, *G.L. c. 273, § 15* n11] . . .), his sworn testimony to the same effect, or an adjudication of paternity under G. L. c. 273." *Lowell v. Kowalski, 380 Mass. at 670.* The court left for later determination "the question whether, in a contested proceeding, proof of paternity may be made out in the absence of" the above described evidence. Ibid. We will assume for purposes of our discussion that the notarized statement, see note 5, supra, constitutes a "sworn statement" that would, upon admission in evidence and established to be the voluntary, knowing statement of the decedent, support an adjudication of paternity.

[***11] Here, because the issue of paternity was contested, the [*239] plaintiff was bound under [**535] *G.L. c. 190, § 7*, either to deliver an adjudication of paternity, or to "commence[], in a court of competent jurisdiction, an action in which the executor or administrator is a named party and in which such paternity is ultimately proved." Delivery of the adjudication or commencement of the action must occur within the one-year period provided under *G.L. c. 197, § 9*. There was no adjudication of paternity, nor did the complainant launch an action within a year from the date of Joseph's death to prove he was her father. n12 The claim was properly dismissed as untimely.

Noreen also seeks to apply to this case the holding in *Commonwealth v. Gruttner, 385 Mass. 474, 475, 432 N.E.2d 518 (1982),* [***12] that "no time bar blocks the

bringing of an action to adjudicate the paternity of an illegitimate child." That decision was specific to criminal nonsupport actions brought pursuant to *G.L. c. 273, § 15*, against living, putative fathers, and has no relevance to the circumstances of this case.

Judgment affirmed.

n1 As administratrix of the estate of Joseph S. Hunter.

n2 This section provides, in relevant part, as follows:

> "If a decedent has acknowledged paternity of a person born out of wedlock or if during his lifetime or after his death a decedent has been adjudged to be the father of a person born out of wedlock that person is heir of his father .... A person may establish paternity if, within the period provided under section nine of chapter one hundred and ninety-seven for bringing actions against executors and administrators, such person either (a) delivers to the executor or administrator an authenticated copy of a judgment rendered by a court of competent jurisdiction during a decedent's lifetime adjudging the decedent to be the father of a person born out of wedlock, or (b) commences, in a court of competent jurisdiction, an action in which the executor or administrator is a named party and in which such paternity is ultimately proved." [***2]

n3 This section provides as follows:

> "(a) Except as provided in this chapter, an executor or administrator shall not be held to

> answer to an action by a creditor of the deceased unless such action is commenced within one year after the date of death of the deceased and unless, before the expiration of such period, the process in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate."

n4 Noreen further claims that, even if the one-year limitation period under *G.L. c. 197, § 9*(a), applies, her complaint is rendered timely by application of *G.L. c. 260, § 32* (new action may be brought within one year of dismissal or "for any matter of form"), or by virtue of equitable tolling. Finally, she claims that *G.L. c. 190, § 7*, is unconstitutional. These arguments lack merit. In any event, we decline to "consider a claim that is asserted for the first time after judgment has been entered below." [***3] *R.W. Granger & Sons v. J & S Insulation, Inc., 435 Mass. 66, 73, 754 N.E.2d 668 (2001).*

n5 The defendant's motion to dismiss was based on the asserted failure of the plaintiff "to comply with the one year statute of limitations for creditors of an estate." Attached to the plaintiff's opposition were sixteen exhibits. Among them is a document purportedly signed by Joseph and notarized on July 31, 1980, stating that "Joseph Hunter . . . does hereby acknowledge that he is the true father of the female person born in Boston, Massachusetts, on December 9, 1955, whose

birth record shows the name 'McKeever.' I further consent that the legal name of Noreen Judith McKeever be changed to Noreen Judith Hunter." Also attached is an affidavit of Hubert Yorra, in which the affiant states that he is an attorney admitted to practice in the Commonwealth, that he previously represented Joseph "in connection with various matters," and that in the course of his personal and professional relationship with Joseph he met Noreen "together with Mr. Hunter [who] stated to me on numerous occasions that Noreen was his daughter."

> It has not been made to appear that these matters, which are outside the pleading, were excluded by the Probate Court judge. We therefore treat the motion as one for summary judgment, as provided by *Mass.R.Civ.P. 12(b)(6)*, 365 Mass. 754 (1974).

n6 Marian alleged that Noreen was Joseph's daughter, but that there was no adjudication of paternity. *Keville v. McKeever, 42 Mass.App.Ct. at 144.* We noted the trial judge's finding that there was no 'credible evidence' that Noreen was in fact Joseph's daughter. *Id. at 144 n. 6.* Because it has not been made to appear that this issue was actually litigated and determined in the earlier proceedings, we place no reliance on that finding in reaching our present decision. See *Jarosz v. Palmer, 436 Mass. 526, 530-531, 766 N.E.2d 482 (2002).* Indeed, the Probate Court judge, on October 18, 1993, denied a postjudgment request to have a paternity test conducted, "without prejudice to renewal after the filing of an appropriate action."

n7 We also upheld the judgment that the McKeevers were liable to Joseph, individually, or jointly and severally, for various sums amounting to approximately $ 1.5 million dollars. *Keville v. McKeever, 42 Mass.App.Ct. at 143.*

n8 Noreen does not claim that Joseph's oral and written acknowledgment of his paternity constitutes a "voluntary acknowledgment of parentage" pursuant to *G.L. c. 209C, § 11*, that -- if properly executed (in writing, jointly by the parents, acknowledged in the presence of a notary public), filed (with the registrar of vital records and statistics), and neither rescinded nor challenged as provided by the statute -- "shall thereafter have the same force and effect as a judgment." *G.L. c. 209C, § 11.*

n9 Noreen claims that some of the documents attached to her opposition to the motion to dismiss, see note 5, supra, would have been available to Nona Porter in prior proceedings.

n10 In *Lowell v. Kowalski, supra,* the court determined the intermarriage requirement in an earlier version of c. 190, § 7, to be unconstitutional. Under that version, an illegitimate child was permitted to inherit by intestacy from her father's estate only if her parents had intermarried, and the father had either acknowledged the child as his or had been adjudged to be the child's father in a proceeding under G. L. c. 273. The court recognized the difficulty in avoiding fraudulent claims of paternity "where the father is deceased . . . . Thus, because the possibility of fraud is usually greater with respect to claims against the

estate of a deceased man than against the estate of a deceased woman, we recognize that the State has a compelling interest in imposing a stricter standard for establishing an illegitimate child's right to inherit from its father than from its mother." *Id. at 669.* At the same time, the court noted, "Where paternity is conceded, we see no justification for denying the right of a child to inherit form his or her natural father. The possibility of fraud is wholly absent." *Id. at 670.*

n11 *General Laws c. 273, § 15*, which imposes a duty of support upon parents of children born out of wedlock, provides that "a voluntary acknowledgment of parentage or an adjudication of paternity under [G. L. c. 209C] . . . shall be conclusive on all persons in proceedings under this section." As we observed at note 8, supra, the Legislature has prescribed in *G.L. c. 209C, § 11*, the form of acknowledgment that will operate as an adjudication of paternity.

n12 We reject Noreen's claim, made without citation to relevant authority, that the requirement of commencing an action within one year was fulfilled upon the filing of her petition for permanent guardianship on May 24, 1991.

LEXSEE 42 MASS. APP. CT. 140

KATHLEEN C. KEVILLE, temporary guardian, n1 vs. MARIAN BOURNE McKEEVER n2 & others. n3

No. 94-P-744.

APPEALS COURT OF MASSACHUSETTS

42 Mass. App. Ct. 140; 675 N.E.2d 417; 1997 Mass. App. LEXIS 26

February 16, 1995, Argued
January 31, 1997, Decided

COUNSEL:

Gary R. Greenberg for Marian Bourne McKeever & others.

Robert S. Potters for John Meldon, trustee.

David A. Guberman (Joanna E. Scannell & James J. McCusker with him) for Kathleen C. Keville.

Ira Nagel, guardian ad litem, was present but did not argue.

JUDGES: Present: Armstrong, Dreben, & Laurence, JJ.

OPINIONBY: ARMSTRONG

OPINION: [*141]

[**421] ARMSTRONG, J. Joseph S. Hunter (Joseph) immigrated to [*142] the [***2] United States in 1924 and, over the next sixty years, amassed substantial assets. The present appeals concern the parties' dispute over the ownership of those assets: on the one side are Joseph's son and daughter; on the other are the children of Joseph's long time bookkeeper, secretary, and, later, personal attendant, Marian McKeever (Marian).

In December, 1990, Joseph's daughter, Nona Porter (Nona), with the consent of Joseph's son, Ronald Hunter (Ron), filed a petition for conservatorship in the Probate and Family Court alleging that Joseph had become incapacitated by reason of mental weakness. A guardian ad litem, appointed to investigate Joseph's mental capacity, filed a report in which he opined that Joseph was incapable by reason of mental weakness to handle his financial affairs or personal needs. The guardian ad litem recommended, inter alia, that the court appoint an independent third party to serve as guardian of the estate of the ward.

On May 24, 1991, shortly after the guardian ad litem had filed his report, Marian's daughter, Noreen Hunter (Noreen), filed a petition for permanent guardianship alleging that Joseph was "unable to make or [to] communicate informed decisions." [***3] By various decrees that were entered in the Probate Court, Attorney Kathleen Keville was appointed temporary guardian of Joseph's person and estate.

On September 23, 1991, Ms. Keville filed a complaint in the Probate Court seeking to set aside two

conveyances, in 1982 and 1990, by Joseph. The complaint alleged that both conveyances were made at a time when Joseph was incompetent and subject to undue influence and, additionally, that the latter conveyance was procured through fraud and forgery. The guardian also sought the return of significant sums of money allegedly removed by Marian, Noreen, and Frank McKeever (Frank), Marian's son, n4 from Joseph's bank accounts and safe deposit boxes. n5 In addition, the guardian sought a declaration that certain mortgages were invalid.

[*143] After a lengthy trial of the consolidated guardianship, equity, and contempt actions, during which the parties attempted unsuccessfully to enter into a settlement agreement, the probate judge issued extensive findings of fact and rulings of law. By a judgment dated September 8, 1993, and amended on January 24, 1994, Joseph was declared to have been incompetent from at [**422] least August of 1982, and Ms. Keville, as we have indicated, was appointed permanent guardian of his person and estate. In addition, the 1982 deed was revoked and rescinded, and Marian was ordered to convey to Joseph all of her interest in the property. Similarly, the 1990 deed was declared void, and Marian and Noreen were ordered to convey their interest in the property to Joseph. The McKeevers were also adjudged liable to Joseph, individually, or jointly and severally, for various sums amounting to approximately $ 1.5 million dollars. Lastly, the judgment declared void, as against the guardian, the mortgages referred to above. Following the denial of their motions for judgment notwithstanding the findings and rulings and for new trial, and the denial in part of their motion to alter or

amend the judgment, findings, [***5] and rulings (the judge struck one sentence from the memorandum of decision), the McKeevers appealed from the amended judgment and the postjudgment orders. John Meldon, as trustee of the Porsche Realty Trust, has also appealed from the amended judgment.

1. The facts. We sketch the pertinent facts, distilled from the judge's 148-page decision. Joseph was born in Lithuania in 1905 and immigrated to the United States in 1924. In 1928, he married Edythe Hunter, and the couple had two children, Nona, in 1931, and Ron, in 1943.

From 1924 until about 1962 Joseph worked as a manufacturing jeweler and a retail jeweler. Starting in about 1953, Joseph also began to purchase real estate, primarily through trusts that he established for the benefit of himself and his family, and gradually developed a "fairly substantial real estate business." Among the properties Joseph purchased, as the trustee of the J. Hunter Realty Trust, were a five-floor, fifteen-room house located at 390 Marlborough Street in Boston, and a twenty-five unit apartment complex located at 231, 233, 239, and 243 Harvard Avenue in Boston and Brookline.

From the early 1950s through 1987 Marian worked for Joseph as his bookkeeper [***6] and secretary. During the period of [*144] her employment, Marian was never paid more than forty or fifty dollars a week by Joseph. Marian had been previously married and had one child, Frank, by that marriage. In 1953, Marian moved into the Marlborough Street property and, in subsequent years, ran the property as a rooming house, collecting and keeping the rents for herself. In

December, 1955, Marian gave birth to Noreen. Although there was (and has been) no adjudication of paternity, Marian alleged that beginning in the early 1950s she and Joseph had had a personal relationship and that Noreen was Joseph's daughter. n6 Indeed, after meeting Joseph, Marian often used the name Marian Hunter and, in September, 1980, Noreen changed her name to Noreen Judith Hunter.

In the mid to late 1970s, Joseph seemed to become increasingly unable to conduct his business affairs or to keep track of his personal financial assets. [***7] In addition, around 1980, there were changes in Joseph's interactions with his family and others. n7 Sometime [**423] in 1982, Joseph moved into the Marlborough [*145] Street property with Marian. From that time forward, Marian was with Joseph constantly and acted as a barrier to his contacts with his children. Joseph's behavior became "increasingly bizarre." He accused his daughter, Nona, who was doing work for him at the Harvard Avenue property, of sleeping with tenants and, as a result of a dispute with her, ordered her to stop working for him and to vacate her apartment at the property.

On December 23, 1982, Joseph, signing as a trustee of a trust that had expired nine and one-half years earlier, executed a deed conveying a joint interest in the Marlborough Street property to Marian. Shortly thereafter, Ron, having learned of Noreen's claim to be his half sister, met with her. Noreen told Ron that Joseph "was crazy, had always been crazy, and that he didn't know what was going on."

In the mid-1980s, Joseph's mental condition continued to deteriorate. n8 In October, 1988, Joseph's personal physician observed that Joseph "demonstrated mental confusion, and was not well oriented and his powers of concentration were very limited." The following February, Joseph was called to testify in a legal proceeding involving one of his properties and was unable to state his correct age or provide other information.

Although there was some taking of Joseph's liquid assets in the mid-1980s, the judge found that, starting in 1988, the McKeevers "engaged in a thorough stripping of essentially all of [Joseph's] assets":

> "Although in the mid-1980's the value of [Joseph's] bank assets were in excess of a million dollars, by the [*146] date of the appointment of the temporary guardian in this matter, only one thousand dollars remained in his name. The defendants [the McKeevers], by the use of forged documents, converted and appropriated for their own use virtually all of [Joseph's] cash assets and safe deposit holdings, resulting in the eventual closing of all but one of his accounts."

In addition, Marian forged Joseph's name and transferred ownership of his car to herself, Noreen forged Joseph's name to obtain credit cards, and Frank deposited Joseph's Social Security checks in his own accounts.

On March 3, 1990, Marian forged Joseph's signature on a deed transferring title to the Harvard Avenue property from him, individually and as trustee of the J. Hunter Realty Trust, to Marian and Noreen, as trustees of the Bourne-Hunter Realty Trust, a trust they had created that same day and of [***10] which they were the sole beneficiaries.

The stripping of Joseph's assets by the McKeevers continued even after the appointment of the guardian ad litem in December, 1990. n9 It was also subsequent to the appointment of the guardian ad litem that the Bourne-Hunter Realty Trust encumbered the Harvard Avenue property by obtaining three successive mortgage loans, at an annual [**424] interest rate of thirty percent, with each loan paying off the previous one. n10

[***11]

On April 29, 1991, Joseph was admitted to a nursing home. At the time of the admission, he was "observed as confused, probably knew his name, but was not oriented to place." As of May 13, 1991, Marian and Noreen agreed that Joseph [*147] should be transferred to the Alzheimer's special care unit at the facility. Joseph's personal physician reported at the time of Joseph's hospital admission in May, 1991, that Joseph had a history of Alzheimer's dementia, and that he carried a secondary diagnosis of presenile dementia.

Based on these findings and others, the judge concluded that Joseph had been incompetent from at least August of 1982, and that by December, 1982 (the time of the conveyance of the Marlborough Street property), he did not have the ability to understand the

nature of his property or to appreciate the natural objects of his bounty. The judge further ruled that the deed purporting to convey the Harvard Avenue property was void "by reason of the fact that [it] was forged, the transfer was fraudulent and the result of undue influence and Joseph . . . was incompetent at the time." The court fashioned a judgment, the relevant portions of which are set forth above.

2. [***12] The McKeevers' appeal.

a. Right to jury trial or to a framing of jury issues.

There is no merit in the McKeevers' argument that the judge erred in denying them their right to a trial by jury as guaranteed by art. 15 of the Massachusetts Declaration of Rights and as demanded by them. See generally *Department of Rev. v. Jarvenpaa, 404 Mass. 177, 185-186, 534 N.E.2d 286 (1989); Dalis v. Buyer Advertising, Inc., 418 Mass. 220, 221-222, 636 N.E.2d 212 (1994).* It is apparent that the guardian, who was seeking essentially to set aside certain conveyances of property by Joseph, and to restore to Joseph's estate cash and personal property taken from him, was seeking primarily equitable relief and that her claims were analogous in subject matter and remedy sought to cases traditionally heard within the court's equity jurisdiction, as it existed at the time of the adoption of the Constitution. Consequently, the McKeevers were not entitled to a jury trial as of right. See *Parker v. Simpson, 180 Mass. 334, 336, 355, 62 N.E. 401 (1902)* (defendant had no right to trial by jury in suit in equity seeking rescission of a contract on the grounds of fraud and [***13] undue influence). See also *Whitlock v.*

Hause, 694 F.2d 861, 865-867 (1st Cir. 1982). Compare and contrast *Dalis v. Buyer Advertising, Inc., 418 Mass. at 223 & n.3.*

Similarly, the judge did not err in denying the McKeevers' motion, styled as one pursuant to *Mass.R.Civ.P. 39(c), 365 Mass. 802 (1974),* to frame for a jury the issues of fraud, [*148] undue influence, and incompetency. Rule 39(c) retains the pre-rules practice of framing issues in "equity" cases for jury trial. Smith & Zobel, Rules Practice § 39.5 (1977). As with prior practice, the framing of jury issues is not a matter of right but is directed to the discretion of the court. *Marcoux v. Charroux, 329 Mass. 687, 688-689, 110 N.E.2d 362 (1953). Charles River Constr. Co. v. Kirksey, 20 Mass. App. Ct. 333, 337, 480 N.E.2d 315 (1985).* Smith & Zobel, supra. Here, the McKeevers' motion to frame jury issues was marked for hearing on the first day of trial. The judge, noting, inter alia, that the McKeevers had made no mention of a jury trial in their pretrial memorandum or at a pretrial conference held six weeks prior to trial and, in fact, had urged that the trial go forward as scheduled, stated that [***14] the McKeevers had waived their claim by their inaction until the morning of trial. In their brief, the McKeevers fail to address the basis for the judge's ruling and fail to articulate (much less demonstrate) how the judge abused his discretion in denying the motion to frame jury issues. In the circumstances, [**425] there is no reason to disturb the judgment. n11

[***15]

b. Failure to enforce written settlement agreement. During the course of trial, and after the probate judge

had heard evidence for nine days, counsel reported to the court a proposed settlement agreement involving the guardian, the McKeevers, and Nona and Ron. By its express terms, the agreement required the approval of the judge on or before March 15, 1993. It further required that written notice of the settlement be sent to the Internal Revenue Service and the Department of Revenue (which were to be afforded the opportunity to object). Ron was not in court on the day the settlement was [*149] reported and, as evidenced by the statements of his counsel, appears to have been unaware of its contents. Upon review of the agreement, Ron refused to sign it, voicing his "outrage" with its terms. Responding to an invitation of the judge, Ron and Nona moved to reconvene the trial, while the McKeevers moved for the entry of judgment pursuant to the proposed settlement agreement. The judge allowed the former motion and denied the latter. In his supplemental rulings of law, the judge, noting that the agreement expressly provided that the settlement be subject to his approval and the entry of an [***16] appropriate order, stated that, after a more careful review of the settlement, he found it to be deficient and not a just and equitable resolution of the dispute. n12

In view of the judge's finding, and the express requirement that the agreement was subject to the judge's approval, there is no need to consider the McKeevers' claims that Ron's signature to the agreement was a "mere formality" or that Ron was otherwise estopped from arguing against the enforcement of the agreement. Moreover, the judge did not abuse his discretion in denying the McKeevers' motion (filed April 1, 1993) to amend their answer to

assert the settlement agreement as an affirmative defense and counterclaim; such an amendment, in the circumstances, would have been futile. See *Bass River Lobsters, Inc. v. Smith, 7 Mass. App. Ct. 197, 198-199, 386 N.E.2d 1276* [***17] *(1979); Dexter's Hearthside Restaurant, Inc. v. Whitehall Co., 24 Mass. App. Ct. 217, 219, 508 N.E.2d 113 (1987)* (motion to amend properly denied where it failed to surmount the inherent invalidity of the claim).

c. Conveyance of Marlborough Street property. The McKeevers argue that the judge erred in failing to direct a verdict in their favor with regard to the Marlborough Street conveyance or, alternatively, that the judge's finding that Joseph was incompetent at the time of the transfer was clearly erroneous.

As we have indicated, in December, 1982, Joseph, as trustee of the J. Hunter Realty Trust, signed a deed conveying a joint interest in the Marlborough Street property to Marian. In her original and amended complaints, the guardian requested as preliminary relief that the court sever the alleged joint tenancy "and convert it into a tenancy in common pending a determination [*150] of this action." On September 23, 1991, the judge ordered that the joint tenancy be "temporarily severed and temporarily converted into a tenancy in common." The final judgment revoked and rescinded the deed conveying the joint interest in the Marlborough Street property and ordered that full [***18] title revert to Joseph, individually.

[**426] We agree with the guardian that so much of the McKeevers' appeal as pertains to the issues now raised has been rendered moot by Marian's death (some fifteen months prior to Joseph's death). As the guardian

correctly notes, "If the judgment [is] upheld, then it vest[s] full title in Joseph; if the judgment [is] reversed and the conveyance to Marian upheld, then full title [is] in Joseph as the survivor of the two joint tenants." n13 Thus, the underlying controversy between the parties is no longer a viable one. See *Wolf v. Commissioner of Pub. Welfare, 367 Mass. 293, 298, 327 N.E.2d 885 (1975).* n14

d. Conveyance of Harvard Avenue property. The McKeevers argue that the probate judge's admission, consideration, and reliance on clearly inadmissible and prejudicial evidence concerning Joseph's competency at the time of the Harvard Avenue conveyance and his gift of certain monies (presumably in 1989-1990) constitutes reversible error. In the alternative, they argue that, even if all of the objectionable evidence were determined to have been properly admitted, the guardian did not make a sufficient showing of incompetence. We disagree.

i. Testimony of Dr. Benjamin Brussel. In January, 1987, Marian brought Joseph to see her psychiatrist, Dr. Brussel, to [*151] obtain a letter attesting to Joseph's competency. Dr. Brussel, who was board certified in psychiatry and neurology (and had been on the staff of the Beth Israel Hospital since 1956), had "some knowledge" of Joseph based on statements made [***20] by Marian during the course of her own therapy. Marian was present during Dr. Brussel's session with Joseph, but, after some preliminary conversation with Marian, the examination consisted solely of interaction between Dr. Brussel and Joseph. After examining Joseph for forty to forty-five minutes,

Dr. Brussel concluded that Joseph was suffering from severe dementia.

Contrary to the McKeevers' assertion, the judge did not err in permitting Dr. Brussel to testify, over their objection, about dementia and to render his opinion that Joseph was suffering from severe dementia. The admission of expert testimony lies largely in the discretion of the trial judge. *Commonwealth v. Devlin, 365 Mass. 149, 152, 310 N.E.2d 353 (1974).* "It is well established that the professional specialty of a medical practitioner offered as a witness need not be precisely and narrowly related to the medical issues of the case." *Kapp v. Ballantine, 380 Mass. 186, 192-193 n.7, 402 N.E.2d 463 (1980). Letch v. Daniels, 401 Mass. 65, 68, 514 N.E.2d 675 (1987).* "The crucial issue is whether the witness has sufficient 'education, training, experience and familiarity' with the subject matter of [***21] the testimony." *Letch v. Daniels, 401 Mass. at 68. McLaughlin v. Selectmen of Amherst, 422 Mass. 359, 361-362, 664 N.E.2d 786 (1996).* Although Dr. Brussel did not hold himself out as an expert in dementia, and he was qualified by the court as an expert in psychiatry (the treatment of mental illness). He stated that he knew about dementia and had treated ten to twenty patients who suffered from dementia. In the circumstances, the judge did not abuse his discretion in admitting Dr. Brussel's opinion testimony.

The McKeevers' additional claim that the admission of Dr. Brussel's testimony violated Marian's psychiatrist-patient privilege n15 [**427] is also without merit. Indeed, it is difficult to perceive how Marian's privilege was violated. The only [*152] specific communication by Marian to Dr. Brussel to which the McKeevers refer in their brief is Marian's

request, made in a therapy session, that Dr. Brussel evaluate Joseph as to his mental competence. The record fails to disclose the nature of any other communication made by Marian to Dr. Brussel concerning Joseph's mental condition, or that Dr. Brussel, in rendering his opinion, divulged any communication made to him by Marian [***22] in the course of her therapy. The McKeevers concede in their brief that the details of Marian's own therapy with Dr. Brussel were not revealed at trial, and we decline to speculate, as the McKeevers urge, that Marian's therapy necessarily involved her relationship with Joseph. In any event, it is apparent that Dr. Brussel's independent examination of Joseph provided the primary basis of his conclusion that Joseph suffered from dementia.

[***23]

ii. Admission of Joseph's testimony in unrelated Probate Court matter. The judge did not err in admitting in evidence, over the McKeevers' objection, a brief transcript of Joseph's testimony in an unrelated 1986 legal proceeding. In that proceeding, Joseph was unable to give his correct age, and the judge determined that he was not competent to testify. The testimony was admissible, not for the truth of its contents, but as evidence of Joseph's state of mind. See Liacos, Massachusetts Evidence § 8.2.6 (6th ed. 1994).

iii. Admission of handwriting expert's opinion. At trial, the guardian's expert, Joyce McCann, testified that Marian had forged Joseph's name on the 1990 deed transferring the Harvard Avenue property to the Bourne-Hunter Realty Trust. The McKeevers now

argue, in the context of their competency discussion, that the judge erred in accepting McCann's opinion because the handwriting specimen she used as Joseph's was not properly authenticated but instead was attributed to Joseph by the plaintiff's attorney. Continuing, they claim that, because there was no independent determination by the fact finder that the specimen was genuine, there was no basis upon which McCann [***24] (who was otherwise unfamiliar with Joseph's handwriting) could render an opinion. See *Newton Centre Trust Co. v. Stuart, 201 Mass. 288, 292, 87 N.E. 630 (1909)* (standard of handwriting cannot be proved by the [*153] opinion of witnesses); *Davis v. Meenan, 270 Mass. 313, 314, 169 N.E. 145 (1930)* (it is for the judge in the first instance to decide whether there is sufficient evidence to permit the standard offered to be introduced in evidence).

The McKeevers' argument fails for the reason, if no other, that they did not move to strike McCann's opinion (that Marian had forged Joseph's name to the 1990 deed) upon learning during cross-examination of the attribution of the signature. See *Pataskas v. Judeikis, 327 Mass. 258, 260, 98 N.E.2d 265 (1951); Sheinkopf v. Eskin, 4 Mass. App. Ct. 826, 350 N.E.2d 469 (1976)*. That aside, in reaching her opinion, McCann used specimens of Marian's signature, including "three original checks." In the circumstances, there was evidence upon which McCann properly could have rendered her opinion. The McKeevers' additional argument, that the judge should not have credited McCann's opinion as to the signature on the 1990 deed because [***25] the original deed was not admitted in evidence, would not require a reversal of the judgment. See *Commonwealth v. Camelio, 1 Mass. App. Ct. 296,*

298 & n.3, 295 N.E.2d 902 (1973). No suggestion is made that the copy of the deed presented to McCann is not a photographically precise copy of the original, and, in fact, it was the [**428] McKeevers who offered the copy in evidence. n16

iv. Additional evidentiary issues. Even if we were to assume, arguendo, that the judge erred in admitting in evidence, and considering in his findings, (1) [***26] an answer filed by Joseph in another action which pleaded that he was incompetent and (2) a tape recording and transcript of a 1987 meeting between Noreen, Nona, and several attorneys at which Noreen stated that Joseph had been incompetent for twenty years and that he did not know what day, month, or time of the year it was, a reversal of the judgment is not required. The judge found specifically that "the ultimate findings in this case concerning incompetence, forgery, fraud, undue influence and the other major issues would remain the same even if [he] had found in the defendants' favor on the evidentiary issues raised [*154] in their postjudgment submissions [which include the evidentiary issues discussed herein]."

On review of the judge's findings, as detailed in our statement of the facts, and as augmented in the margin, n17 we conclude that there was ample evidence apart from the answer and the tape recording to support the judge's ruling that Joseph was incompetent at the time of the Harvard Avenue conveyance. Contrary to the McKeevers' assertion, it is also clear that the judge, in determining the question of competency, had in mind the legal standard that they claim is here applicable, [***27] i.e., whether Joseph had the ability to

understand the nature of his property and to appreciate the natural objects of his bounty.

[***28]

e. The contempt action. Within days of receiving the September 23, 1991, order restraining them from using or disposing of any of Joseph's cash assets, or cash assets traceable to him, the McKeevers closed several bank accounts containing substantial sums of money that, the probate judge found, were directly traceable to Joseph. By the terms of the judgment, the McKeevers were ordered to pay to the court the sum of $ 220,125, which represented amounts traceable to Joseph that the McKeevers had expended for their own personal use. No sanction independent of the judgment was imposed on the McKeevers. Although the judge noted in his findings and judgment that the McKeevers had violated the court's orders, he made no specific finding that they were in contempt. Accordingly, it would be an empty exercise to [*155] consider the McKeevers' argument that they should not have been held in contempt. n18

[***29]

[**429] f. Computation of monies owed by McKeevers. There is no merit in the McKeevers' argument that the probate judge wrongfully denied them credit for over $ 700,000 that they claim to have expended to renovate the Harvard Avenue property after a fire. The McKeevers' brief assertion on this point, which fails to discuss the record or cite any relevant authority, does not constitute appellate argument as contemplated by Mass.R.A.P. 16(a)(4), as

amended, *367 Mass. 921 (1975)*. See *Lolos v. Berlin, 338 Mass. 10, 13-14, 153 N.E.2d 636 (1958)*. That aside, it is clear that the judge rejected as self-verifying the exhibit that purported to list $ 719,000 of expenditures on the Harvard Avenue property, and cross-examination severely undermined Noreen's testimony attempting to support a number of the listed expenditures. The judge's finding rejecting the alleged credit in the aggregate was not clearly erroneous. n19

[***30]

g. Counsel fees. The guardian sought compensation for her fees, expenses, and costs and those of her counsel under *G. L. c. 206, § 16*, and *G. L. c. 215, § 45*. By the terms of the judgment and a subsequent order of the Probate Court, the judge awarded compensation in excess of $ 500,000 to be paid from various escrowed and trusteed funds.

In view of the decision we reach on the merits of their appeal, it is established that the McKeevers have no interest in Joseph's estate. Hence, they are in no position to challenge the award of fees. In any event, there was no error.

A judge has considerable discretion in awarding attorney's fees under the applicable statutes. His award is presumed to [*156] be right and will not be disturbed without a showing that the fee is excessive. See *Rhode Island Hosp. Trust Natl. Bank v. Burns, 12 Mass. App. Ct. 251, 254, 423 N.E.2d 1 (1981); Strand v. Hubbard, 31 Mass. App. Ct. 914, 915, 576 N.E.2d 688 (1991)*. In making his award of attorney's tees in the case at bar, the judge had in mind the appropriate

standards set forth in *Cummings v. National Shawmut Bank, 284 Mass. 563, 569, 188 N.E. 489 (1933)*, such as the time spent, the [***31] amount in dispute, the importance of the matter involved, and the results achieved. n20 See, e.g., *Paone v. Gerrig, 362 Mass. 757, 763, 291 N.E.2d 426 (1973)* (citing Cummings for attorney's fees under § 16); *Rhode Island Hosp. Trust Natl. Bank v. Burns, 12 Mass. App. Ct. at 258 n.10* (citing Cummings); *Strand v. Hubbard, 31 Mass. App. Ct. at 915* (listing similar factors for awards of attorney's fees under § 45).

Here, the quality of the efforts by the guardian and her counsel is attested to by the benefits obtained for Joseph. The magnitude of the effort is reflected in the probate judge's voluminous findings and the eight volumes of the record appendix plus the transcripts of the fourteen-day trial during [***32] which thirty-three witnesses testified and 198 exhibits were admitted in evidence.

The McKeevers' initial objection to the award of attorney's fees -- that the guardian depleted Joseph's estate by failing to settle the case -- overlooks the facts that the motion to reconvene the trial was filed by Joseph's children, not by the guardian, and that the probate judge refused to enforce the proposed settlement, later ruling that it was not a just and equitable resolution of the dispute. Similarly, there is nothing in the McKeevers' second objection, that the guardian and her attorneys performed duplicative and unnecessary services, that would require a reversal of the order for counsel fees. Although the McKeevers cite what are said to be examples of such services (e.g., duplicative charges for telephone conferences and "time

billed by more than one attorney in the courtroom or in depositions when only one attorney's presence was necessary"), they do not explain why any of the supposed examples involve [**430] duplicative or unnecessary efforts. To the contrary, in fashioning the award for attorney's fees [*157] the judge reasonably could have concluded, in view of the size of Joseph's estate and the [***33] factual complexity of the case, that it was not unnecessary or a waste of judicial resources for lawyers on the same side of the case to discuss matters together or to participate in the same events. n21

3. The appeal of Porsche Realty Trust.

a. Voidable deed. The judge found that the Harvard Avenue deed was forged and, accordingly, the Porsche Realty Trust mortgage was void. The trustee for the Porsche Realty Trust, while conceding that "this legal conclusion follows from this finding," argues that the finding upon which the ruling is premised is clearly erroneous. Specifically, he asserts that the notary's certificate on the 1990 deed is proof presumptively of a valid acknowledgment, see *Iantosca v. Iantosca, 324 Mass. 316, 321, 86 N.E.2d 59 (1949); Hale v. Hale, 332 Mass. 329,* [***34] *333, 125 N.E.2d 142 (1955),* and that the guardian failed to overcome the presumption by clear and convincing evidence. Therefore, the trustee argues, because the finding that the deed was forged was clearly erroneous, its mortgage was not void but, at most, was voidable because of Joseph's incompetence. n22 See *Farnum v. Silvano, 27 Mass. App. Ct. 536, 538-539, 540 N.E.2d 202 (1989).* In the trustee's view, even if Joseph was incompetent or subject to undue influence

at the time the deed was signed, the mortgage would still be enforceable as the trust was, essentially, a bona fide purchaser for value.

[***35]

Whether a notary's certificate is a "true presumption" or "rather the drawing of an inference of regularity and compliance with law," *Hale v. Hale, 332 Mass. at 333*, we agree with the guardian that it was rebutted by (a) the notary's admission that she notarized a signature on a document (the 1990 deed) that was not signed in her presence; (b) Marian's admission that the Harvard Avenue deed was signed out of the notary's presence, and (c) McCann's expert opinion that [*158] it was Marian who signed Joseph's name to the deed. n23 That Marian may have signed the deed in Joseph's physical presence would not preclude a finding of forgery particularly where, as here, there was no evidence the probate judge was bound to accept that Joseph, who was incompetent, knew and approved of what Marian was doing. To the contrary, the judge accepted McCann's opinion that Marian signed the deed herself (rejecting the claim that Marian had merely guided Joseph's hand) and stated expressly that any suggestion of a subsequent ratification of the deed by Joseph was completely without merit.

[***36]

Even if the deed conveying the Harvard Avenue property were merely voidable, it would not follow that Porsche's mortgage was valid notwithstanding Joseph's incompetence. Although *Farnum v. Silvano, 27 Mass. App. Ct. at 538-539*, the case relied upon by Porsche,

indicates that a transaction entered into by a mentally incompetent person is voidable, it does not consider the question whether the grantee of a voidable deed may give good title to a bona fide purchaser. That question was answered [**431] in *Cleaveland v. Malden Sav. Bank, 291 Mass. 295, 296-297, 197 N.E. 14 (1935):*

> "The deed of the plaintiff to her son was voidable because she was non compos mentis at the time of the execution and delivery. Such a deed is ineffectual to convey a title to land good against the grantor unless ratified and confirmed by the grantor when restored to soundness of mind . . . . If the mental incompetency of the plaintiff is established in a proceeding by which the defendant is bound, the defendant as an innocent purchaser for value from the son to the extent of its mortgage stands no better than the son and acquired no title to the land. Since the deed of the plaintiff to the [***37] son has been declared void, she has been in truth the owner [*159] of the land at all times here material." (Citations omitted.)

b. Equitable lien. Notwithstanding the judge's finding that Porsche's mortgage on the property was void and of no legal effect, he determined that Richard Finnerty, trustee of the K & F Realty Trust, and John Meldon, trustee of the Porsche Realty Trust, were entitled to an equitable lien in the amount of $ 31,115.97. This sum represents proceeds from the mortgages that were paid out at the closings directly for the benefit of the Harvard Avenue property (i.e., for

the payment of taxes and insurance). The judge, citing *Farnum v. Silvano, supra,* stated that no additional "consideration need be given for improvements . . . which the mortgage funds might have subsidized . . . because they were not requested by [Joseph] . . . ." The trust, relying on cases such as *Kressler v. Flynn, 323 Mass. 610, 83 N.E.2d 876 (1949),* and pointing to a stipulation between the parties that was an exhibit at trial, argues that the amount of the equitable lien should be adjusted upward. We agree.

In Kressler, the court stated: "If an insane person has in [***38] his possession or control the consideration or its proceeds or the benefits which accrued to him out of the transaction which he seeks to set aside, he should upon the granting of rescission be required to restore to the other party what he derived and still has from the transaction." *Id. at 613.* Indeed, even where a conveyance of property is rescinded because of a defendant's wrongful actions, "in the absence of special circumstances rendering it inequitable the defendant will, in general, be entitled to credit for payments made by [him] or out of [his] funds for taxes . . . and for necessary repairs [though generally not improvements to the property] to the extent that they increased the value of the property." *Lang v. Giraudo, 311 Mass. 132, 140-141, 40 N.E.2d 707 (1942).* Cf. *Farnum v. Silvano, 27 Mass. App. Ct. at 541* (generally, consideration ought not to be given to any improvement in the property which the defendant may have made because they were not requested by the plaintiff).

In the instant matter, the guardian entered into a stipulation with the trustees of the K & F Realty Trust and the Porsche Realty Trust, the purpose of which

was "to compromise [***39] and limit the evidence that Porsche and/or Finnerty must [*160] present in its defense in this case." The signatories stipulated that on March 27, 1991, $ 43,923 of the proceeds of the first mortgage given to Finnerty by Noreen and/or Marian, as trustees of the Bourne-Hunter Realty Trust, was deposited in a bank account. The signatories further stipulated in paragraph 3 that after the date of the deposit, certain disbursements amounting to $ 41,635.32 were made from the same bank account for the benefit of the Harvard Avenue property. These sums were in addition to the $ 31,115.97 paid for taxes and insurance. The signatories agreed that the trust and Finnerty would not be required to present further evidence with respect to the amounts paid or with respect to whether the disbursements actually provided a benefit to Harvard Avenue. The stipulation also recites:

> "The parties do agree . . . that if the Court enters judgment in the litigation assigning ownership of 231-243 Harvard Avenue . . . to Joseph . . . that the expenditures listed in Exhibit A [$ 41,635.32] were made for the benefit of Harvard Avenue, and that the Guardian will not contest the authenticity of the disbursements [***40] against Porsche and/or Finnerty. This stipulation does not preclude or prevent the Guardian from presenting evidence or arguing that these [**432] expenditures were made from funds other than from Porsche and/or Finnerty. . . ."

There was no sound basis on the record for limiting the amount of the equitable lien to $ 31,115.97. By the

terms of the stipulation, the guardian undertook the burden of demonstrating that the expenditures listed in the agreement were made from funds other than from the Porsche Realty Trust and/or Finnerty. We have found no such evidence (none was cited to us), n24 and the judge made no specific finding that the guardian sustained her burden on this issue. If we were to assume that the distinction between repairs and improvements [*161] has application in the present case, n25 the purpose of the stipulation was to limit the evidence that the Porsche Realty Trust and the K & F Realty Trust were required to present. The trustees were not required to offer further evidence that the disbursements actually provided a benefit to the Harvard Avenue property; thus, it was not incumbent on the trustees to demonstrate that the expenditures made were for "necessary" repairs or [***41] work. In the absence of any finding that the Porsche Realty Trust or the K & F Realty Trust were involved in the McKeevers' machinations, we think that equity demands that the amount of the lien be adjusted to reflect the amount specified in the stipulation. n26

[***42]

4. Summary. The McKeevers' appeal from paragraph 4 of the judgment, as amended, is moot. The judgment, as amended, is modified by striking from paragraph 8 thereof the figure $ 31,115.97, and inserting in place thereof the figure $ 72,751.29. As so modified, the judgment is affirmed. The orders denying the motion for judgment notwithstanding the findings and rulings and the motion for new trial, and denying in part the motion to alter or amend the judgment, findings, and rulings, are affirmed.

So ordered.

n1 The above-captioned action was consolidated for trial with a petition for guardianship of Joseph S. Hunter. Ms. Keville was initially appointed temporary guardian of Joseph's person and estate. By a decree dated September 8, 1993, she was appointed permanent guardian of Joseph's person and estate. That provision was stayed on appeal, and Ms. Keville was ordered to continue in her capacity as temporary guardian. During the pendency of the appeal, a suggestion of Joseph's death was filed in this court. Thereafter, Mary H. Schmidt, the special administrator of Joseph's estate, filed a motion to substitute party requesting that she be substituted for Ms. Keville, the former guardian. We allow the motion to substitute but retain the original names in the case caption to avoid confusion.

n2 Marian Bourne McKeever was sued individually and as trustee of the Bourne-Hunter Realty Trust. A suggestion of Marian's death was filed in this court on January 18, 1995. Attorney Stephen W. Howe was appointed special administrator of Marian's estate. The defendants have moved to substitute Howe as the representative for Marian in this matter. We allow the motion to substitute.

n3 Noreen Judith Hunter, individually and as trustee of the Bourne-Hunter Realty Trust; Frank J. McKeever, individually; Richard J. Finnerty, as trustee of the K & F Realty Trust; John Meldon, as trustee of the Porsche Realty Trust; and seven trustee process defendants.

n4 We shall refer to Marian, Noreen, and Frank, collectively, as the McKeevers.

n5 The guardian obtained an ex parte restraining order on September 23, 1991, prohibiting the McKeevers, among other things, from "using or disposing of any of [Joseph's] cash assets, or cash assets traceable to [Joseph]." On August 13, 1992, the guardian filed a complaint for civil contempt alleging that the McKeevers had violated this order.

[***4]

n6 The judge found that there was no "credible evidence" that Noreen was, in fact, Joseph's daughter.

n7 The rental units at Harvard Avenue began to deteriorate, and a number of tenants stopped paying rent; he received foreclosure notices on several of his properties (and eventually sold off most of his real estate holdings); ten of his accounts were turned over to the abandoned property division of the Treasury Department. Indeed, Joseph spent much of his "business" time "fiddling" with his jewelry and "looking through boxes of jewelry over and over."

During the late 1970s and early 1980s Joseph made uncharacteristic gifts of money and became lost and disoriented at a family gathering. He became increasingly unable to answer questions from his grandson about his early years. By 1981,

Joseph had some difficulty focussing on conversations and appeared unable to understand fully that his wife had been hospitalized with a broken hip. In addition, Joseph, for the first time, failed to attend one of Ron's theatrical performances in Boston and seemed unaware that Nona had been away for one year in the Peace Corps.

In 1982, Joseph was the plaintiff in a lawsuit involving a fire loss at one of his properties. He was unable to assist his then attorney in the suit and, in August, 1982, he could not answer simple preliminary questions put to him at a deposition. In fact, after the deposing attorney had terminated the deposition, Joseph asked his attorney several times, "What was that all about?," "Why am I here?," and "Where's my money?" That same year, Joseph's personal physician, in response to Joseph's intellectual deterioration, prescribed for Joseph a psychotropic drug -- Hydergine -- used then for individuals who were forgetful and were developing intellectual deficits and losing their powers of concentration. Joseph also manifested a "continuingly increasing inability to handle his financial affairs," as evidenced by his failure in 1982 to pay his assessed city taxes on the Marlborough Street property.

[***8]

n8 Joseph's personal physician observed that he was "progressively more forgetful," and, although he could make some decisions, "the complexity of the decisions would determine whether [Joseph] could understand them"; he seemed unable to appreciate his wife's death in 1984, and failed even to recognize the home he had owned and shared with his wife since 1939; he conveyed a joint interest in that home to Ron, even though he no longer had an ownership interest in the property; and he was unable to comprehend that a trust that held property owned by him on Tremont Street in Boston had terminated, leaving Ron and Nona as the property's beneficial owners.

[***9]

n9 For three months, the guardian ad litem was "frustrated" in his efforts to see Joseph. When he finally did see him in March, 1991, Joseph did not know his own name and was not responsive to such questions as time, date, and day of week. In response to the guardian ad litem's inquiry concerning deadbolts on the front door of the Marlborough Street property, Marian stated that she had had them installed because Joseph had been "wandering" for about. three years.

n10 On March 22, 1991, the Bourne-Hunter Realty Trust borrowed $ 80,000 from Richard F. Finnerty, as trustee of the K & F Realty Trust. This loan was refinanced on May 3, 1991, by the borrowing of $ 235,000 from the K & F Realty Trust. A third mortgage, to the Porsche Realty Trust, closed on July 10, 1991. Again the funds

were provided by Richard Finnerty. In all, Finnerty disbursed approximately $ 300,000 in connection with the three loans.

n11 There is no merit in the McKeevers' additional claim that the court lacked subject matter jurisdiction over the action because the guardian failed to post a bond in accordance with *G. L. c. 246, § 1.* Section 1, as amended through St. 1986, c. 708, § 8, and as read against the backdrop of the Massachusetts Rules of Civil Procedure, "is no longer jurisdictional in the primary sense, and . . . the plaintiff's failure to file the required bond should not be treated as having deprived the court of jurisdiction to determine the action on the merits." *Big D Carpets, Inc. v. The Welch Group, Inc., 37 Mass. App. Ct. 312, 315, 639 N.E.2d 1085 (1994).* See *Bird v. Capital Site Mgmt. Co., 423 Mass. 172, 174-175, 667 N.E.2d 826 (1996).* Moreover, as the guardian succeeded in establishing the liability of the McKeevers, the McKeevers have not been prejudiced by the absence of a bond, "the sole purpose of which is to secure payment of the defendant's costs and damages resulting from the attachment on trustee process." *Big D Carpets, Inc. v. The Welch Group, Inc., 37 Mass. App. Ct. at 315-316.*

n12 There also is no evidence in the record before this court that notice was sent to the Internal Revenue Service and the Department of Revenue, as required by the agreement.

n13 We reject the McKeevers' assertion that the issue is not moot because if the Marlborough

Street conveyance is upheld as valid "there can be no dispute that the property would be held in a tenancy in common" by virtue of the judge's order of September 23, 1991, and the judgment itself. Apart from the question whether the McKeevers are estopped from reversing their earlier position, as stated in various postjudgment motions, that if Marian prevails in her appeal, the Marlborough Street property "will be restored to a joint tenancy with Marian . . . and Joseph . . . as joint tenants," see *Brown v. Quinn, 406 Mass. 641, 646, 550 N.E.2d 134 (1990)*, it is apparent that the judge's order of September 23 was interlocutory in nature and manifested the judge's intention that, after a trial on the merits, title to the Marlborough Street property was to be either solely in Joseph or in Joseph and Marian as joint tenants. [***19]

n14 Though we do not reach the question, we note that the guardian offered substantial evidence in support of her allegation that Joseph was incompetent at the time of the Marlborough Street conveyance

n15 General Laws c. 233, § .20B, as amended through St. 1990, c. 177, § 361, provides that, with certain exceptions, "in any court proceeding . . . a patient shall have the privilege of . . . preventing a witness from disclosing, any communication . . . between said patient and a psychotherapist relative to the diagnosis . . . of the patient's mental . . . condition." Section 20B defines "patient" as "a person who, during the course of diagnosis or treatment communicates with a psychotherapist," and further defines

"communications" as "relating to diagnosis or treatment."

n16 In their reply brief, the McKeevers argue that, because the Harvard Avenue deed was acknowledged by a notary, it is presumptively valid and the guardian failed to rebut that presumption by clear and convincing evidence. This argument comes too late. See *Campbell Hardware, Inc. v. R.W Granger & Sons, 401 Mass. 278, 280, 516 N.E.2d 150 (1987).* In any event, the argument fails for the reasons set out, infra, in our discussion of the appeal of the Porsche trust.

n17 The judge also considered the opinion of Dr. Michael Miller, a witness for the guardian who was the director of inpatient psychiatry at Beth Israel Hospital. In preparing his testimony, Dr. Miller examined Joseph and reviewed, among other things, the deposition transcripts of Dr. Brussel and Joseph's personal physician. Doctor Miller concluded that Joseph's behavior in 1987-1988 was consistent with a course of primary degenerative dementia of the Alzheimer type and that, at the time, Joseph, most likely, did not have the capacity to make important decisions for himself and for his business matters. The McKeevers' expert, Dr. Benjamin Liptzin, agreed that Joseph was suffering from "the early stage of dementia" in 1982. Both Dr. Miller and Dr. Liptzin were asked a hypothetical question, based on facts in evidence, about Joseph's competency in or about December, 1982. Doctor Miller testified that "putting the facts together with the more recent information there is a good chance that Joseph

was incapable at that time." Doctor Liptzin testified that he had insufficient information to answer the question, but that the facts posed in the question would be "worrisome" to him.

n18 In any event, it is doubtful that the judge would have erred in adjudging the McKeevers in contempt. A central thrust of the McKeevers' argument is that the judge's order was not clear and unambiguous as it failed to specify in any detail what constituted cash assets traceable to Joseph. See generally *Larson v. Larson, 28 Mass. App. Ct. 338, 340, 551 N.E.2d 43 (1990); Whelan v. Frisbee, 29 Mass. App. Ct. 76, 82, 557 N.E.2d 55 (1990).* They claim that Marian's name was on three of the bank accounts at issue and that they believed that the money in the accounts was hers. It is apparent, however, that the judge did not find those assertions credible.

n19 The McKeevers' scant argument on this subject in their brief does not attempt to identify any specific items on the list as to which documentation was purportedly adequate. It is not our function to construct such an argument.

n20 The standards to be applied in determining the reasonableness of the fees to be allowed a fiduciary involve comparable criteria. *Paone v. Gerrig, 362 Mass. 757, 763, 291 N.E.2d 426 (1973).* See also *McMahon v. Krapf, 323 Mass. 118, 123, 80 N.E.2d 314 (1948).*

n21 In their request to the Probate Court for attorney's fees, the McKeevers also sought compensation for the services of two attorneys to meet with various witnesses and to prepare for and attend the trial.

n22 The trustee challenges the judge's finding that Joseph was incompetent at the time of the 1990 conveyance. As we have discussed, there was ample evidence to support the judge's finding and ruling. We have also rejected, in connection with the McKeevers' appeal, the argument that the legal standard for entering into a contract, rather than a donative transfer, was applied in determining the question of competency.

n23 The trustee states in his brief that although there are no Massachusetts cases "on point," many other jurisdictions have ruled that the presumption can be overcome only by clear and convincing evidence, a burden of proof he urges us to adopt. The record provided by the trustee, however, does not disclose whether he pressed this point below, and, consequently, we need not consider it. It is to be noted that, even if we were to assume that the more stringent burden is applicable, the evidence in this case is on par with that accepted as clear and convincing proof in an out-of-State case cited by the trustee. See *Sadacca v. Monhart, 128 Ill. App. 3d 250, 254-255, 83 Ill. Dec. 463, 470 N.E.2d 589 (1984).*

n24 In her brief, the guardian does not point to any part of the voluminous record that demonstrates that the funds used were other than from the Porsche Realty Trust and/or Finnerty.

We note that a number of checks were drawn on the account (to pay for the expenses listed in the stipulation) immediately following the deposit of the funds.

n25 For a strong argument that the distinction should not make a difference, see *United States v. Francis, 623 F. Supp. 535, 537-538 (D.V.I. 1985).*

n26 We reject the trustee's arguments that the judge erred in failing to adjust further the amount of the equitable lien to reflect additional sums ($ 18,471.50) that were allegedly spent on n26 We reject the trustee's arguments that the judge erred in failing to adjust further the amount of the equitable lien to reflect additional sums ($ 18,471.50) that were allegedly spent on 6,091. The former amount was not covered by the stipulation, and it is difficult to discern, from the record references provided by the Porsche Realty Trust, how the figure was arrived at. As to the Porsche Realty Trust's closing costs, it is enough to say that those costs did not directly benefit Joseph or his property and, indeed, only a portion of the mortgage proceeds was used to benefit the Harvard Avenue property. Compare and contrast *Fuss v. Fuss (No. 2), 373 Mass. 445, 450-451, 368 N.E.2d 276 (1977).* It is to be noted that the judge found that Noreen's purpose in obtaining the mortgage loans was "to put as much on the property as soon and as quickly as possible because Nona and Ron were going to try to take the property from her, and by having a lien on the property, it would be a lot harder to do."

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

NOREEN JUDITH HUNTER vs. NONA PORTER.

2/20/1999

JUDGMENT ON MOTION TO DISMISS

After hearing, it is ordered that the Complaint for Declaratory Judgment filed December 11, 1997 is dismissed. The complaint was not filed within one year of Joseph S. Hunter's death as required by G.L.c. 190 Sec. 7 and G.L.c. 197 Sec. 9.

A memorandum of decision will not fillow this judgment as contemplated at the hearing on the defendant's moiton to dismiss since it appears that the statute of limitations clearly mandates dismissal. Furthermore, extraneous equity considerations, if relevant, would favor the defendant. See Keville v. McKeever, 42 Mass. App. Ct. 140 (1997).

1/19/99

John M. Smoot
Associate Justice

LEXSEE 442 MASS. 1104

NOREEN JUDITH HUNTER
vs. NORA PORTER

June 30, 2004, Decided

[NO NUMBER IN ORIGINAL]

SUPREME JUDICIAL COURT OF MASSACHUSETTS

NOTICE: [*1] UNPUBLISHED ORDER RENDERED UNDER RULE 1:28 OF THE RULES OF THE APPEALS COURT.

OPINION: *Further appellate review denied.*